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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1062

MAXWELL DARKS and MARVIN OLIVO,
Petitioners.

VERSUS

TRANSOK PIPE LINE COMPANY,
An Oklahoma Corporation,
Respondent.

BRIEF OF AGNES LUCAS, NOW WESLEY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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STATUTORY PROVISION CONFERRING JURISDICTION ON APPEAL

The Final Order of the United States Court of Appeals, Tenth Circuit, was entered on November 14, 1977, with order denying rehearing on December 12, 1977. (App. B, p.'s B-10 and B-23)

The Petition seeking Certiorari was filed within 90 days from the last date invoking this Court's jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254(1).

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SUBSTANTIAL FEDERAL QUESTIONS

The following substantial federal questions are presented in this Brief in Support of Petition for Writ of Certiorari requiring plenary consideration, to-wit:

(1) The Order of March 5, 1973, No. 96,291 from the Corporation Commission of Oklahoma in Case No. 35,868, required to be attached to the Complaint filed herein under 52 O.S. § 36.5 is void as to the Petitioners because of Respondent's failure to comply with Sec. 11, 61 Stat. 732, Act of August 4, 1947.

If the Order of March 5, 1973, No. 96,291 is not void on its face, the United States District Court did not have jurisdiction to hear this proceedings under 31 Stat. 1084 (25 U.S.C. § 357) because there is not a single Indian Allottee owning any interest in Tracts 1 and 2 with this restricted Indian heir of an Allottee, as required by this statute in order to establish jurisdiction.

(2) Respondent Transok Pipe Line Company did not make the Secretary of Interior, Legal Guardian of the restricted Indians—an indispensable party—a party defendant in this action nor serve him with summons or notice as required by Federal Rule 4(d)(5).

(3) The United States District Attorney for the Eastern District of Oklahoma is not the authorized Attorney to represent restricted Indian heirs who are members of The Five Civilized Tribes in condemnation actions in the state or federal courts.

(4) Eminent Domain for an underground gas storage warehouse is not permitted on the land of restricted mem-

bers of The Five Civilized Tribes under paragraph I, Act of May 27, 1908, 35 Stat. 312.

Said proceedings invalid by reason of repugnancy to due process and equal protection of the law under Art. 2, § 7 and § 24, Constitution of Oklahoma, and Amendments V and XIV, Sec. 1, Constitution of the United States, and said rulings further constituting denial of other federal rights.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari seeks review of Judgment and Order of the United States Court of Appeals, Tenth Circuit, of November 14, 1977, with Rehearing denied on December 12, 1977.

This type of condemnation proceedings is authorized under 52 O.S. §§ 36.1-36.7 and 66 O.S. §§ 51-55. Jurisdiction for this state condemnation action in the Federal District Court is said to be 31 Stat. 1084, 25 U.S.C. § 357.

(1) *Lack of Jurisdiction*

Corporation Commission Proceedings

On October 25, 1972, Respondent Transok Pipe Line Company filed Case No. 35,868 before the Corporation Commission of Oklahoma seeking to obtain an order and certificate that an area consisting of approximately 3,660 acres of real property was suitable for the underground storage of natural gas in the "Channel Booch Formation" situated in the matrix of the land approximately -2.500 feet below the surface in Hughes County, Oklahoma.

Respondent Wesley owns an undivided ½ of the fee in Tract 1 (undivided 40 acres) except as to the oil and gas minerals in which she only owns an undivided ⅓ interest. Petitioner also owns ⅓ of the oil and gas in Tract 2. (App. B, pp. 5, 6)

A certificate and Finding is required by 52 O.S. § 36.4 that (a) the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest and (b) for a determination of the amount of recoverable oil and native gas, if any remaining therein.

Respondent Wesley offers no evidence as to what happened at this hearing inasmuch as her legal guardian, the Secretary of Interior, was not served with notice of this proceedings, nor did he approve this proceedings in behalf of restricted members of The Five Civilized Tribes as required by Section 11, Act of August 4, 1947, 61 Stat. 732.

Therefore, Order No. 96,291 from Corporation Commission Case No. 35,868, which was attached to the Complaint in this condemnation action as required by 52 O.S. § 36.5 is void for failure to comply with Sec. 11, 61 Stat. 732.

The Secretary of Interior, or his representative, thereafter refused to approve this proceedings after negotiations broke down between Respondent and representatives of the Secretary of Interior to execute a long-term lease for gas storage rights under 25 U.S.C. § 415. (App. A, p. 2; App. D, p. 2)

District Court Action

The Respondent, Transok Pipe Line Company, filed a Complaint in the Federal District Court with Oklahoma Corporation Commission Order No. 96,291 attached to the Complaint alleging condemnation jurisdiction under 25 U.S.C. § 357. (App. Ct. App., Vol. I, p. 1)

The Respondent, Transok Pipe Line Company, does not allege that any of the defendants below are the original allottees but does allege that some defendants below are restricted Indians (Members of The Five Civilized Tribes) while other defendants are non-restricted co-tenants in ownership of the land being condemned. Since none of the defendants below are allottees in Tract 1, or Tract 2, the District Court does not have jurisdiction in this matter.

(2) ***Secretary of Interior, Guardian of restricted Indians and an indispensable Party, was not served with summons or notice of this proceedings.***

In the Complaint filed in the District Court, Respondent Transok Pipe Line Company failed to name the Secretary of Interior, Guardian of restricted Indians, as a party to the action. Nor was summons or notice of the proceedings in the District Court served upon him as required by Rule 4(d)(5), Federal Rules of Civil Procedure, or as required by Sec. 6, Act of May 27, 1908, 35 Stat. 312 and Sec. 4, Act of August 4, 1947, 61 Stat. 732. (App. A, p.'s 4 and 10)

The Respondent, Transok Pipe Line Company merely served (1) the individual restricted wards, (2) non-restricted co-defendants, and (3) The United States of America, by serving the United States Attorney for the Eastern

District of Oklahoma, as a matter affecting title to certain Indian lands previously allotted in fee with certain restraints on alienation and presently restricted under the law as to the present owners of said lands.

Respondent Transok Pipe Line Company failed to serve the legal guardian of the restricted Indians herein, the Secretary of Interior. As guardian of restricted Indians, the Secretary of Interior is an indispensable party to the litigation in behalf of their wards.

(3) ***United States Attorney for the Eastern District of Oklahoma is not authorized to represent the restricted Indian heirs of the original Allottees of The Five Civilized Tribes.***

When this condemnation action was filed, the United States Attorney for the Eastern District of Oklahoma interceded in the negotiations between Respondent and attorneys representing the Secretary of the Interior who had been attempting to secure a long-term gas storage contract in behalf of the Indian land owners authorized under 25 U.S.C. § 415. (App. A, p. 2; App. D, p. 1)

The United States Attorney's Office accepted a settlement in behalf of the restricted Indians based on the appraised value by the commissioners appointed under Art. 2, § 24, Constitution of Oklahoma, and 66 O.S. § 53. This settlement completed on August 22, 1975, when Judge Joseph W. Morris entered Judgment and Order. (App. B, p. 1) Respondent Wesley received $2,543.86 for her fee interest in Tract 1 and $543.86 for the oil and gas minerals in Tract 2.

It is herewith noted that the settlement on August 22, 1975, (App. B, p.'s 5 & 6) constituted approximately 1½% of

the actual value of Respondent Wesley's interest in the underground warehouse under Tract 1 on the date of taking. According to the offer of proof by a petroleum engineer, at the jury trials, Respondent Wesley's interest (the same as Defendant Maxwell Darks' interest) had a fair market value between a willing seller and a willing buyer on October 1, 1973, of $200,920.00. (App. Ct. App., Vol. II, p. 340)

There is nothing in the record of this case to reflect that this settlement of August 22, 1975, was approved by the Secretary of Interior or showing that the Bureau of Indian Affairs in Muskogee, Oklahoma (an agency under the Secretary of Interior), agreed to this settlement. Nor is there any authority under the law to demonstrate that the United States Attorney for the Eastern District of Oklahoma has any authority to usurp the duties of the Secretary of Interior as Guardian of the restricted Indians in this condemnation action. This judgment is therefore void.

(4) *The taking of a subsurface strata or formation such as described in 52 O.S. § 36.3(c) is not permitted by law.*

Paragraph 1, Act of May 27, 1908, 35 Stat. 312, does not allow eminent domain in connection with an underground gas storage warehouse in restricted Indian land belonging to members of The Five Civilized Tribes. Under the above law, eminent domain can be had in connection with Indian land for right-of-way purposes only. Therefore, this action must fail from a substantive standpoint.

Because of the foregoing this judgment is void.

On August 23, 1976, Respondent Wesley filed a Motion to Set Aside the Judgment and Order of Distribution of

August 22, 1975, alleging that the United States District Attorney did not have authority to represent the restricted Indians. It was further alleged therein that the Court did not have jurisdiction of the restricted Indian heirs under 25 U.S.C. § 357 and that § 1, Act of May 27, 1908, 35 Stat. 312, did not permit condemnation of an underground gas storage warehouse. The Motion was overruled in the Order of the District Court filed on September 7, 1976. (App. B, p. B-8)

Appeal to the United States Court of Appeals Tenth Circuit resulted in the Order of November 14, 1977. (App. B, p. B-10)

Petitioners Darks and Olivo thereafter filed Petition for Writ of Certiorari and Respondent Wesley files this Brief in Support of the Petition filed herein.

ARGUMENT

Since the early discovery of oil and gas in the late 1920's, on allotments of members of The Five Civilized Tribes, there has been a controversy with conflict between the United States Attorney for the Eastern District of Oklahoma and attorneys representing the Bureau of Indian Affairs (an agency under the Secretary of Interior). This controversy involves a power struggle as to who will have the last say on what is best for the restricted Indians.

Mr. W. F. Semple is recognized as an authority in this field of law. In his book "Oklahoma Indian Land Titles," published by Thomas Law Book Co., he devotes Chapter XXI to a discussion of jurisdiction as it pertains to state

and federal courts. The Act of April 26, 1926, 44 Stat. 239, pertains to cases which were actually filed against restricted Indians *in the state courts* of Oklahoma. This Act afforded the federal government an option to remove the litigation to its own court as pointed out in § 382 on page 288.

Section 383, page 288 therein states the following:

> "It will be noted that Section 3 of the Act of 1926 provides a type of procedure for the transfer of causes to the federal court that is independent of the general statutes relating to removals to the federal courts on account of diversity of citizenship or other jurisdictional grounds. In the removal to the federal court under this special Act of Congress, the amount in controversy is not of any consequence. The test is, Does the action involve a restricted Indian or the rents, profits or income from a restricted tract of land?"

Obviously, this statute has no bearing on this lawsuit which is an original action instituted under a separate statute, namely 31 Stat. 1084, 25 U.S.C. § 357.

In Chapter XXIII, § 468, p. 338 of Mr. Semple's book, the title and opening sentence in this section is as follows:

> "Condemnation Proceedings Against Restricted Allottees.—The only court which has jurisdiction in condemnation proceedings against restricted Indian *allottees* is the United States court. . . ." (Emphasis ours)

In drafting Section 3, Act of April 26, 1926, Congress failed to note a discrepancy which failed to specifically name the Secretary of Interior, or his representative, to represent restricted Indians when the case was removed from the state court, and make the decision as to whether

actions actually filed in the state courts against restricted members of The Five Civilized Tribes should be removed to the federal courts—in the best interest of the Indians. This error was corrected in Sec. 3(c) of the Act of August 4, 1947, 61 Stat. 732.

In § 405, page 299, Mr. Semple states the following:

> "§ 405. Removals to the Federal Court Under the Act of April 12, 1926 are now Under the Control of the Secretary of the Interior and Not the Attorney General.—By Section 3 (c) of the Act of August 4, 1947 the Secretary of the Interior alone is clothed with power to determine when causes are to be transferred to the federal court under the Act of April 12, 1926. Prior to the 1947 Act and under the provisions of Section 3 of the Act of 1926 causes were removed at the instance of the Attorney General, without reference to the concurrence or approval of the Secretary of the Interior. The purpose of this amendment inserted in the Act of 1947 was to empower the Secretary of the Interior, as the official having immediate charge of all matters relative to restricted Indians, to decide whether or not a case should be transferred to the federal court, *whereas theretofore the two departments were sometimes in conflict and occasionally did not agree upon the question as to the advisability of removing the cause.*" (Emphasis ours)

In Town of *Okemah* v. *United States* (10th Cir. 1944), 140 F.2d 963, the facts reflected therein show that the Town of Okemah filed a condemnation action against restricted *Allottees* in the state court. The United States Attorney removed the case to the United States District Court under his authority to do so under the Act of April 12, 1926, 44 Stat. 82. The federal court then dismissed the case because

25 U.S.C. § 357 requires that condemnation be filed as an original action against *Allottees* in the federal court.

The Act of August 4, 1947, 61 Stat. 732, transferred legal representation in removal cases from the state court from the United States Attorney to attorneys representing the Secretary of Interior, Guardian of the restricted Indians.

It is herewith noted that Respondent Transok Pipe Line Company negotiated with attorneys and the Oil and Gas Geological Department of the Bureau of Indian Affairs attempting to obtain a long-term storage lease commencing in 1971 (App. D, p. 1). When they could not obtain a long-term storage agreement "on their terms" they simply filed suit against the restricted Indian heirs of Allottees in the Federal District Court and made the United States of America, a co-defendant. They failed to name the Secretary of Interior a party defendant and also failed to serve him as required under Rule 4(d)(5), Federal Rules of Civil Procedure. Since the Secretary of Interior is Guardian of the restricted Indians he is an indispensable party to the proceedings as pointed out in *United States* v. *Oklahoma Gas and Electric Co.*, 127 F.2d 349, *aff'd* 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed.2d 716 (1936).

The authority for the United States District Attorney to act as attorney for the restricted Indians in this case is not disclosed either in the record of this case or under 31 Stat. 1084. The Indians have not signed any waiver allowing such representation in the record of this case. Under Oklahoma law set out in *Pettis* v. *Johnson*, 78 Okl. 277, 190 Pac. 681 (1920), such representation is subject to direct or collateral attack.

Martinez v. *Southern Ute Tribe of Indians*, 249 F.2d 915 (1957), held that the Federal Courts are courts of limited jurisdiction and can take cognizance of only those matters which Congress has entrusted to them by statute. The case also states that in the absence of statute they have no jurisdiction merely because an Indian is a ward of the government. Although the *Martinez* case was a case wherein the government sought to sue for the restricted Indians, the converse is also true when restricted Indians are made defendants in a diametrically opposite situation.

Further, Paragraph 1, Act of May 27, 1908, 35 Stat. 312, is very clear that the only type of condemnation that will be allowed on lands of restricted members of The Five Civilized Tribes will be for "right-of-way" only. 52 O.S. §36.3(c) describes a taking of a fee interest in the matrix below the surface and is not a right-of-way but an underground gas storage warehouse.

Cases believed to sustain this Court's jurisdiction are:

—*United States* v. *Oklahoma Gas and Electric Co.*, 127 F.2d 349, *aff'd* 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed. 716 (1936);

Fuentes v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972);

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

CONCLUSION

Respondent Wesley respectfully requests that this case be remanded to District Court with instructions to dismiss because of lack of jurisdiction as to this Respondent and the Petitioners herein because of lack of jurisdiction to condemn an underground gas storage warehouse on restricted Indian land.

Respectfully submitted,

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February, 1978

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APPENDIX A

(1) U.S. CONST., amend. V, Due Process Clause [U.S.C.A. Const. Amend. V, p. 4]

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) U.S. CONST., amend. XIV, Sec. 1 [U.S.C.A. Const. Amendments 13 to 14, p. 33]

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

25 U.S.C. INDIANS

(3) 31 Stat. 1084 (25 U.S.C. § 357), [25 U.S.C.A., p 426]

§ 357 Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Mar. 3. 1901. c. 832, § 3, 31 Stat. 1084.

(4) 25 U.S.C.A, p 103 pocket part

§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

(a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the Burns Paiute Reservation, the Coeur d'Alene Indian Reservation, the Kalispel Indian Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque, the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation, Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Soboba Indian Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

(b) Any lease by the Tulalip Tribes under subsection (a) of this section, except a lease for the exploitation of any natural resource, shall not require the approval of the Secretary of the Interior (1) if the term of the lease does not exceed fifteen years, with no option to renew, or (2) if the term of the lease does not exceed thirty years, with no option to renew, and the lease is executed pursuant to tribal regulations previously approved by the Secretary of the Interior.

As amended Nov. 4, 1963, Pub.L. 88—167, 77 Stat. 301; Apr. 27, 1966, Pub.L. 89—408, 80 Stat. 132; Dec. 8, 1967, Pub.L. 90—182, 81 Stat. 559; Dec. 10, 1967, Pub.L. 90—184, 81 Stat. 560; June 10, 1968, Pub.L. 90—335, § 1(f), 82 Stat. 175; June 20, 1968, Pub.L. 90—355, 82 Stat. 242; Sept. 28, 1968, Pub.L. 90—534, § 6, 82 Stat. 884; Oct. 12, 1968, Pub.L. 90—570, 82 Stat. 1003; June 2, 1970, Pub.L. 91—274, §§ 2, 3, 84 Stat. 302; June 2, 1970, Pub.L. 91—275, §§ 1, 2, 84 Stat. 303; Dec. 17, 1970, Pub.L. 91—557, § 8, 84 Stat. 1468; Dec. 15, 1971, Pub.L. 92—182, § 6, 85 Stat. 626; Sept. 26, 1972, Pub.L. 92—431, 86 Stat. 723; Oct. 9, 1972, Pub.L. 92—472, § 7, 86 Stat. 788; Oct. 13, 1972, Pub.L. 92—488, § 4, 86 Stat. 806.

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(5) ACT OF MAY 27, 1908.

35 Stat. 312

An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Classification of restricted allottees.

Secretary may remove restrictions.

Right of eminent domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters

Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

* * * * * *

Authority conferred on the county courts as to minors, etc.

§ 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regu-

lations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

Representatives of the Secretary to represent restricted allottees.

And said representatives of the Secretary of the Interior are further authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them

in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

* * * * * *

Procedure on sale of inherited land.
Children born since Mar. 4, 1906.
Acknowledgment of wills.

§ 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hun-

dred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

* * * * * *

(6) ACT OF APRIL 12, 1926

44 Stat. 239

An Act To amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes.

* * * * * *

Procedure applicable on transfer to federal court.
State court to proceed no further.

Sec. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty

days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in the case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court

of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

Approved, April 12, 1926

44 Stat. 239

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(7) ACT OF AUGUST 4, 1947

61 Stat. 732

An Act Relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma, and for other purposes.

Half-blood heirs and devisees restricted.

Ten days notice.

Consideration to be recited.

Grantor present unless excused by Probate Attorney.

Not removable to federal court.

Court may approve conditionally.

Probate attorney may appeal.

Sales of minors and incompetents controlled by state laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange,

partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: Provided, (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal court; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor

or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters generally, except that no appeal bond shall be required; (f) that sales of the interests of minor and incompetent persons shall be made in conformity with the laws of the State of Oklahoma. Notice of such sale shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition for sale is to be heard; (g) that nothing contained in this section shall be construed to modify or repeal the Act of February 11, 1936 (49 Stat. 1135), relating to leases for farming and grazing purposes.

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Probate attorney to represent restricted members.

§ 4. That the attorneys provided for under the Act of May 27, 1908 (385 Stat. 312), are authorized to appear and represent any restricted member of the Five Civilized Tribes in Oklahoma before any of the courts of the State of Oklahoma in any matter in which the said restricted Indian may have an interest.

* * * * * *

When and how state oil and gas conservation laws apply to restricted land.

§ 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: Provided, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

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(8) FEDERAL RULES

1975 Edition West Publishing Co., pp. 32 and 33;
Rule 4(d)(5)

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

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(9) 2 Okl. Stats. 1971 Official Ed., p 3072 [52 O.S.A. § 1, p 31]

52 O.S., GAS COMPANIES AND PIPE LINES
UNDERGROUND STORAGE OF GAS

§ 36.1 Definitions

As used in this Act[1] (a) "underground storage" shall mean storage in a subsurface stratum or formation of the earth; (b) "natural gas" shall mean gas either while in its original state or after the same has been processed by removal therefrom of component parts not essential to its use for light and fuel; (c) "native gas" shall mean gas which has not been previously withdrawn from the earth; (d) "natural gas public utility" shall mean any person, firm or corporation authorized to do business in this State and engaged in the business of transporting or distributing natural gas by means of pipe lines into, within or through this State for ultimate public use; (e) "commission" shall mean the State Corporation Commission.

Laws 1951, p. 134, § 1, eff. May 26, 1951.

(10) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 32]

§ 36.2 Public interest and welfare

The underground storage of natural gas which promotes conservation thereof, which permits the building of reserves for orderly withdrawal in periods of peak demand, which makes more readily available our natural gas resources to the domestic, commercial and industrial consumers of this State, and which provides a better year-round market to the various gas fields, promotes the public interest and welfare of this State.

Therefore in the manner hereinafter provided the commission may find and determine that the underground storage of natural gas as hereinbefore defined is in the public interest.

Laws 1951, p. 134, § 2, eff. May 26, 1951.

(11) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 33]

§ 36.3 Condemnation of subsurface stratum or formation—Operation of storage facilities—Limitations

Any natural gas public utility may condemn for its use for the underground storage of natural gas any subsurface stratum or formation in any land which the commission shall have found to be suitable and in the public interest for the underground storage of natural gas, and in connection therewith may condemn such other interests in property as may be required adequately to examine, prepare, maintain and operate such underground natural gas storage facilities; provided, however, that the right of condemnation of underground sands, formations and strata, granted hereby, shall be limited as follows:

(a) No sand, formation, or stratum which is producing or which is capable of producing oil in paying quantities,

through any known recovery method, shall be subject to appropriation hereunder;

(b) No gas bearing sand, formation, or stratum shall be subject to appropriation hereunder, unless the volumes of native gas originally in place therein shall be shown to be substantially depleted, and that such sand, formation or stratum has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for any particular class or group of consumers of natural gas, or for the conservation of natural gas, than for the production of the relatively small volumes of native gas which will remain therein, provided that no gas sand, formation or stratum shall be condemned under the terms of this Act[1] when the gas therein is being used for the secondary recovery of oil, unless gas in necessary and required amounts is furnished to the operator or operators of the secondary recovery operations for as long as oil is produced in paying quantities in the secondary operations for the recovery of oil at the same cost as that at which the gas was being produced at the time of condemnation by the operator of the secondary recovery project or projects.

(c) Only such area of such underground sand, formation or stratum as may reasonably be expected to be penetrated by gas displaced or injected into such underground gas storage reservoir may be appropriated hereunder.

(d) No rights or interest in existing underground gas reservoirs, being used for the injection, storage and withdrawal of natural gas, owned or operated by others than the condemner, shall be subject to appropriation hereunder.

The right of condemnation hereby granted shall be without prejudice to the rights of the owner of said lands or of other rights or interests therein to drill or bore through the underground stratum or formation so appropriated in such manner as shall comply with orders, rules and regulations of the commission issued for the purpose

of protecting underground storage strata or formations against pollution and against the escape of natural gas therefrom and shall be without prejudice to the rights of the owner of said lands or other rights or interests therein as to all other uses thereof. The additional cost of complying with such regulations or orders in order to protect the storage shall be paid by the public utility.

Laws 1951, p. 135, § 3, eff. May 26, 1951.

(12) 2 Okl. Stats. 1971 Official Ed., p 3073 [52 Okl. St. Ann. § 1, p 34]

§ 36.4 Certificate of commission

Any natural gas public utility desiring to exercise the right of eminent domain as to any property for use for underground storage of natural gas shall, as a condition precedent to the filing of its petition in the district court, obtain from the commission a certificate setting out findings of said commission (a) that the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas and that its use for such purposes is in the public interest; (b) the amount of recoverable oil and native gas, if any, remaining therein; provided, that the commission shall issue no such certificate until after public hearing is had on application, pursuant to notice served in compliance with notice in civil actions in the district court, together with notice published at least once each week for two (2) successive weeks in some newspaper of general circulation in the county or counties where the gas is proposed to be stored, the first publication to be at least ten (10) days prior to the date of the hearing.

Laws 1951, p. 135, § 4, eff. May 26, 1951.

(13) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 35]

§ 36.5 Petition to district court—Examination and determination—Subsequent proceedings

Any natural gas public utility having first obtained a certificate from the commission as hereinbefore provided, desiring to exercise the right of eminent domain for the purpose of acquiring property for the underground storage of natural gas shall do so in the manner hereinafter provided. Such natural gas public utility shall present to the district court of the county wherein the land is situated, or to the judge thereof, a petition setting forth the purpose for which the said property is sought to be acquired, a description of the property sought to be appropriated and the names of the owners thereof as shown by the records of such county. The petitioner shall file the certificate of the commission as a part of its petition and no order by the court granting said petition shall be entered without such certificate being filed therewith. The court or the judge thereof shall examine said petition and determine whether the petitioner has the power of eminent domain and whether said property is necessary to its lawful purposes, and if found in the affirmative, such finding shall be entered in the record and subsequent proceedings shall follow the procedure now provided by law in the exercise of the rights of eminent domain by railroads.

Laws 1951, p. 136, § 5, eff. May 26, 1951.

(14) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 36]

§ 36.6 Ownership of gas

All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, shall at all times be deemed the property of the injector, his

heirs, successors or assigns; and in no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, under which said gas storage fields, sands, reservoirs, and facilities lie, or of any person other than the injector, his heirs, successors and assigns, to produce, take, reduce to possession, waste, or otherwise interfere with or exercise any control thereover, provided that the injector, his heirs, successors and assigns, shall have no right to gas in any stratum, or portion thereof, which has not been condemned under the provisions of this Act,[1] or otherwise purchased.

Laws 1951, p. 136, § 6, eff. May 26, 1951.

(15) 2 Okl. Stats. 1971 Official Ed., p 3074 [52 Okl. St. Ann. § 1, p 37]

§ 36.7 Partial invalidity

If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such decision shall not, in any way, invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.

Laws 1951, p. 136, § 7.

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66 Ok. St. RAILROADS

(16) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 286]

§ 51 Power to enter upon and appropriate lands

Every railroad corporation incorporated under this Article,[1] and any railroad corporation authorized to construct, operate or maintain a railroad within this State, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and

appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machine-shops, switches, sidetracks, turntables, snow defences and water stations; all material for the construction of such road and its appurtenances, and the right of way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by the law. R.L. 1910, § 1397.

(17) 3 Okl. Stats. 1971 Official Ed., p 3986 [64 Okl. St. Ann. § 1, p 289]

§ 52. Purchasing or taking realty

Any railroad corporation may purchase and use real property for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real property taken as aforesaid, when not agreed upon, shall be ascertained and determined as hereinafter provided.

R.L. 1910, § 1399.

(18) 3 Okl. Stats. 1971 Official Ed., p 3986

§ 53. Taking by eminent domain—Commissioners—Appointment and proceedings—Right to construct road.—If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member

of his family over fifteen (15) years of age, or, in case of his nonresidence in the state, by such publication in a newspaper as the judge may order, direct the sheriff of said county to summon three disinterested freeholders to be selected by said judge as commissioners, and who must not be interested in a like question. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of said railroad, and they shall assess the damages which said owner will sustain by such appropriation of his land, irrespective of any benefits from any improvement proposed, and they shall forthwith make report in writing to the clerk of the said court, setting forth the quantity, boundaries, and value of the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk, and a certified copy thereof may be transmitted to the register of deeds of the county where the land lies, to be by him filed and recorded (without further acknowledgment or proof) in the same manner and with like force and effect as is provided for the record of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises. R.L. 1910, § 1400; Laws 1971, c. 33, § 1. Operative Jan. 1, 1972.

(19) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p 312]

§ 54. Compensation, accrual of right to

When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice

to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation. R.L. 1910, § 1401.

(20) 3 Okl. Stats. 1971 Official Ed., p 3988 [64 Okl. St. Ann. § 1, p. 51 pock. part]

§ 55. Review of commissioners' report—Jury trial—Notice

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

(B) Within ten (10) days after the report of commissioners is filed, the court clerk shall forward to the attorney of record for the condemnor, the attorney of record for each condemnee, and to all unrepresented condemnees, a copy of the commissioners' report and a notice stating the time limits for filing an exception or demand for jury trial as specified in paragraph (A) of this Section. This notice shall be on a form prepared by the Court Administrator, which shall be approved by the Supreme Court, and shall be distributed to all clerks of the district court by said Court Administrator. If a party has been served by publication, the clerk shall forward a copy of the report of commissioners and notice of time limits for filing an exception

or demand for jury trial to the last known mailing address, if any, and shall cause a copy of the notice of time limits to be published in one (1) issue of a newspaper qualified to publish legal notices, as defined in 25 O.S. Supp. 1969, § 106. After issuing the notices provided herein, the court clerk shall endorse on the notice form filed in the case, the date and that a copy of the report together with the notice was mailed to each party or his attorney of record, or the date the notice was published in compliance with the provisions hereof.

(C) The time limits for filing an exception and demand for jury trial, as prescribed in paragraph (A) of this Section, shall be calculated from the date the report of the commissioners is filed in the case. On failure of the court clerk to give notice within the time prescribed in paragraph (B) of this Section, the court, on application of any party, may extend the time for filing an exception to the report or a demand for trial by jury for a period not to exceed twenty (20) days from the date the application is heard.

R.L. 1910, § 1402; Laws 1961, p. 497, § 1; Laws 1970, c. 322, § 1, eff. Jan. 1, 1971.

APPENDIX B

FILED
AUG. 22, 1975

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma Corporation, Plaintiff, vs. An easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma, AND The United States of America, et al., Defendants.	)	Case No. 73-186 Civil

JOURNAL ENTRY OF JUDGMENT
AND ORDER OF DISTRIBUTION

This matter comes on to be heard on this 22nd day of August, 1975, upon the Stipulation and joint motion of Plaintiff and Defendant, The United States of America, Guardian and owner of the legal title to said land for the use and benefit of certain Restricted Indians, for a judgment, at which time the Plaintiff appeared by its Attorney, Andrew Wilcoxen, and the Defendant, The United States of America, Guardian, appeared by Edwin L. Gage, Assistant

United States Attorney for the Eastern District of Oklahoma, and said parties in open court having agreed that this matter might be heard without further notice, and the Court fully advised in the premises, finds:

1.

This is an action of a civil nature brought by the Plaintiff, Transok Pipe Line Company, an Oklahoma corporation, against the United States of America, Guardian of the legal title to the lands involved in this action, which lands has heretofore been allotted in severalty to certain Restricted Indians who are wards of the United States of America, for the taking and appropriation under the power of eminent domain of an easement and rights over the tract of land hereinafter described, and for the ascertainment and award of just compensation to the owner and parties interested therein. Jurisdiction in this cause arises out of the Act of Congress of May 3, 1901, Chapter 832, Sec. 3, 31 Stat. 1084, 25 USCA Sec. 357, 52 Okl. Stat. Annotated, Sec. 22 and 27, Sec. 36.1 to 36.7, and 66 Okl. Stat. Annotated, Sec. 51 to 60 inclusive. Rule 71A(k) of the Federal Rules of Civil Procedure apply.

2.

Plaintiff is a corporation organized and existing under the laws of the State of Oklahoma, and is engaged, as authorized by its Articles of Incorporation, in the business of transmitting and transporting natural gas for public purposes, and is a Natural Gas Public Utility as defined by 52 Okl. Stat. 36.1 et seq., and that it is necessary for Plaintiff in the furtherance of its public business to acquire certain easements and rights across lands hereinafter described, and Plaintiff is authorized to exercise the right of eminent domain for the purpose of taking and appropriating such easements and rights across said lands for the purposes hereinafter set forth which it has been unable to obtain by private negotiations.

3.

It is necessary for Plaintiff to take and appropriate easements and rights for the construction, operation, maintenance and use of the lands described hereinafter for the purposes of the underground storage of natural gas, including the right to construct pipelines, drill wells, and enter upon said properties in the proper use and operation of such underground natural gas storage fields, together with the right to continue to use certain existing natural gas wells, the leasehold interest in which was acquired by Plaintiff prior to the implementation of its underground natural gas storage project. That Defendant, The United States of America has not filed in this cause any defense or objection to the taking and appropriation of such easements and rights as set forth in Plaintiff's Complaint, and therefore, has waived such defense or objection.

4.

That the Plaintiff and Defendant, The United States of America, Guardian, filed a Stipulation herein agreeing that the evidence which would be presented by each as to the damage and injury arising by reason of the appropriation of the aforesaid easements and rights would be identical as to the amount thereof and, therefore, no issue remains to be presented to a jury.

5.

That the Defendant, United States of America, Guardian, and the Plaintiff, Transok Pipe Line Company, have each filed a Demand for Jury Trial and that said Defendant and Plaintiff have withdrawn such Demands.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Transok Pipe Line Company, have and recover judgment against the Defendant, The United States of America, Guardian of the legal title in said lands for the use and benefit of certain Restricted Indians, con-

demning and vesting in Plaintiff a perpetual easement and rights to construct, maintain, use and operate its gas storage facility with all rights necessary thereto as set out in the Complaint herein together with the right to continue to use, maintain, and operate existing pipelines owned by Plaintiff and located upon the following described lands and the right to continue to use, operate and maintain the existing wells from the surface to the base of the Channel Booch formation together with the equipment appurtenant thereto, presently owned by Plaintiff located upon the following described lands, all situated in Hughes County, Oklahoma.

Tract 1: The East Half (E½) of the Southeast Quarter (SE¼) of Section 21, Township 8 North, Range 11 East, containing 80 acres, more or less with respect to one-half the surface interest and all of the mineral interest.

Tract 2: The West Half (W½) of the Southwest Quarter (SW¼) of Section 22, Township 8 North, Range 11 East, containing 80 acres more or less with respect to the mineral interest only.

Tract 3: With respect to the mineral interest only.

Tract 3: The West Half (W½) of the Northeast Quarter (NE¼) of Section 28, Township 8 North, Range 11 East, containing 80 acres more or less, with respect to one-half of the mineral interest only.

Tract 4: The West Half (W½) of the Northeast Quarter (NE¼) of Section 29, Township 8 North, Range 11 East, containing 80 acres more or less, with respect to the mineral interests only.

Tract 5: The Southeast Quarter (SE¼) of Section 30, Township 8 North, Range 11 East, containing 160 acres more or less with respect to the surface and mineral interests in their entirety and upon which a 16-inch pipeline has been constructed and upon which a 4-inch pipeline has been constructed.

Tract 6: The Northeast Quarter (NE¼) of Section 36, Township 8 North, Range 10 East, containing 160 acres more or less, with respect to an undivided 23/24ths of the mineral interest only.

Tract 7: The North Half (N½) of the Northwest Quarter (NW¼) (Lots 3 and 4) of Section 1, Township 7 North, Range 10 East, containing 78.89 acres more or less, with respect to the surface and mineral interests in their entireties.

Which easements and rights shall include the right, privilege and authority of ingress and egress to said properties for the purposes of operating, maintaining, repairing and removing pipelines and other facilities necessary and incident to the use of said lands for the purposes of operating and maintaining its underground natural gas storage facility, provided that any damage which may be done by Plaintiff in future entries for the aforesaid purposes will be compensable to Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States of America, Guardian of restricted interests in said lands, have and recover judgment against Plaintiff for the use and benefit of certain Creek Indians in the amount of $30,358.49 which is determined to be the compensation and damages to which said Defendant Creek Indians are entitled by reason of the taking and appropriation of the easement and rights hereinbefore described, and that the Clerk of this Court be and hereby is directed to disburse said sum as follows:

Tract 1:

Agnes Lucas now Wesley Rt. 1, Wetumka, OK 74883	$ 2,543.86
Louis Hobia Rt. 1, Wetumka, OK 74883	$ 543.87
Susie Lasley now Martinez Rt. 1, Wetumka, OK 74883	$ 543.87

Tract 2:

Agnes Lucas now Wesley ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Louis Hobia ..... $ 543.87
Rt. 1, Wetumka, OK 74883

Susie Lasley now Martinez ..... $ 543.86
Rt. 1, Wetumka, OK 74883

Tract 3:

Beaden Hope ..... $ 815.80
Rt. 2, Box 287, Henryetta, OK 74437

Tract 4:

Bureau of Indian Affairs Individual Indian)
Money Account of Amos Yargee, 7/8 Blood)-$ 1,631.60
Creek NB-940, Deceased)
c/o Area Director, Bureau of Indian Affairs
Federal Building, Muskogee, OK 74401

Tract 5:

Bureau of Indian Affairs Individual Indian)
Money Account of Frances Joyce Wesley now)-$13,967.20
Wood, Full Blood Creek-Choctaw, unenrolled)- 8,994.80*
c/o Area Director, Bureau of Indian Affairs $ 4,972.40
Federal Building, Muskogee, OK 74401

*This amount distributed pursuant to Order dated August 22, 1975.

Tract 6:

Yarner Tebe ..... $ 543.87
Rt. 1, Sasakwa, OK 74867

Arthur Tebe ..... $ 543.87
601 North Miller, Oklahoma City, OK 73120

Polly Tebe now Brown ..... $ 543.87
Rt. 1, Holdenville, OK 74848

John Tebe ..... $ 543.87
Rt. 1, Box 184, Konawa, OK 74849

Charlie Tebe ..... $ 543.87
Rt. 1, Sasakwa, OK 78467

Harry Carbitcher ..... $ 135.96
728 S.E. 13th Street, Oklahoma City, OK 73125

Sampson Harjo ..... $ 135.96
526 West 11th Street, Holdenville, OK 74848

Bureau of Indian Affairs Individual Indian)
Money Account of Malinda Harjo a/k/a Ma-)-$ 135.96
rinda Harjo, ¾ Blood Creek-Seminole,)
unenrolled
c/o Area Director, Bureau of Indian Affairs
Federal Building, Muskogee, OK 74401

Tract 7:

Molly Mae Brown ..... $ 1,110.70
Rt. 1, Holdenville, OK 74848

Buster Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Josephine Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Wisey Mae Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

Tootsie Brown ..... $ 1,110.69
Rt. 1, Holdenville, OK 74848

s/ Joseph W. Morris
DISTRICT JUDGE

APPROVED AS TO FORM:

s/ Andrew Wilcoxen
Andrew Wilcoxen
Attorney for Plaintiff

s/ Edwin L. Gage
Edwin L. Gage
Assistant United States Attorney
United States of America,
Guardian of restricted
interests of certain Creek Indians

FILED
SEP 7 1976
LEWIS L. VAUGHN
Clerk, U. S. District Court
By
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

TRANSOK PIPE LINE COMPANY, an Oklahoma corporation, Plaintiff,	)	
-vs-	)	No. 73-186-C
An Easement for the preparation, use and operation of a gas storage facility in the Channel Booch formation to be located upon, over and under certain tracts of land in Hughes County, Oklahoma,	)	
AND	)	
The United States of America, et al., Defendants.	)	

ORDER DENYING MOTION TO
SET ASIDE JUDGMENT

Louis Hobia, a/k/a Louis Hopia, Susie Martinez, Agnes Lucas now Wesley, and Beaden Hope, restricted Creek Indians, have filed a motion to set aside judgment and order of distribution filed on August 28, 1975, pursuant to a stipulation and joint motion of the plaintiff and the defendant, the United States of America, guardian and owner of the legal title to said land for the use and benefit of these movants. Movants have filed a brief in support of the motion. The United States and the plaintiff have responded.

It is the contention of the movants that the judgment and order of distribution is void because the Secretary of Interior was not made a party defendant in this condemnation proceeding and that accordingly this Court did not have jurisdiction, the United States Attorney on behalf of the United States was not authorized to enter into the agreed stipulation as to just compensation and that the judgment is void.

The United States was joined as a defendant in this condemnation action, which action was brought pursuant to the provisions of 25 U.S.C. § 357. From inception the United States, as guardian of the interests of the movants who now seek to set aside this judgment, vigorously represented their interests. The judgment entered by this Court was rendered at the joint request of the plaintiff and the United States in its capacity as guardian for these movants.

The contention of the movants that the Secretary of Interior was an indispensible party to this action and that this Court was without jurisdiction is without merit. The law plainly is that the United States of America, not the Secretary of Interior, is an indispensable party. *Town of Okemah, Oklahoma* v. *U. S.*, 140 F.2d 963 (10th Cir. 1944).

The motion to set aside the judgment is denied.

ORDERED this 7th day of September, 1976.

s/ Joseph W. Morris
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit
NOV 14 1977
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 76-1647, 76-1648 and 76-1972

TRANSOK PIPELINE COMPANY, an Oklahoma corporation,

Plaintiff-Appellee,

MAXWELL DARKS, MARVIN OLIVO, AGNES LUCAS NOW WESLEY,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 73-186)

Submitted: September 29, 1977

Andrew Wilcoxen (Kenneth W. East, on the brief), for Plaintiff-Appellee.

Carl Michael Smith and Robert G. Grove for Defendants-Appellants Maxwell Darks and Marvin Olivo.

Gary P. Snow for Defendant-Appellant Agnes Lucas now Wesley.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The appellee Transok Pipeline Company brought this condemnation suit against Marvin Olivo, Maxwell Darks, and Agnes Lucas now Wesley, and a number of others. The purpose of the action was to condemn an easement for the underground storage of natural gas, pursuant to an Oklahoma statute, 52 O.S. § 36.3 et seq. Federal jurisdiction is said to arise under 25 U.S.C. § 357, which authorizes the condemnation of lands allotted in severalty to Indians in the same manner as lands owned in fee. Jurisdiction as to appellants Darks and Olivo, who are not Indians, rests on the fact that a number of restricted Indians, including the appellant here, Lucas now Wesley, and the United States government, the fee holder in trust of Indian lands, are all named as defendants. Darks' cotenant in one tract and the mineral owners in his and Olivo's property are restricted Indians. This presents a somewhat tenuous problem with respect to pendent jurisdiction over state claims against persons other than the defendants on the federal claim, where a common nucleus of fact is present in both the federal claims and the state claims.

The Indian defendants were represented by the United States Attorney for the Eastern District of Oklahoma. On August 22, 1975, the Assistant United States Attorney representing the Indian defendants and the attorney for Transok entered into a stipulation that there was no issue to be submitted to a jury. Judgment was entered in accordance with a stipulation as to the amount, and it was directed that this be distributed among the individual defendants. The appellant Lucas (now Wesley) signed a stipulation which she received in the mail and accepted the check that accompanied it. Now she claims that she did not fully understand the stipulation and had no contact with the attorney who represented her. On August 23, 1976, her effort with three other restricted Indian defendants to set aside the judgment was denied.

The Olivo and Darks cases were submitted to the jury on August 25, 1975, and verdicts were returned which the trial court held, on motion for new trial, to be excessive. A new trial was granted and at the second trial the awards were much less.

Darks was the owner of a one-half surface interest in 80 acres which was in tract 1. He owned the entire surface interest in the 80 acres of tract 2.

Olivo was the owner of a surface interest in tract 6, which was 160 acres. The mineral rights as to the Darks and Olivo tracts were owned by restricted Indians (so Darks and Olivo were seeking compensation for the diminution of their surface rights).

The evidence disclosed that the Darks' property here considered was part of a larger cattle ranch. The evidence also showed the land to be primarily suitable for farming and ranching. However, there was somewhat wooded area and a lake on the property. There was at least a contention that some of the area around the lake was suitable for residential development. Also, on the property was an abandoned oil and gas well and tract 2 was subject to an oil and gas lease.

The Olivo property was also primarily used for range and agriculture, and there was at least some possibility of residential development in the wooded parts of it. The Olivo property was also subject to oil and gas leases and had a pipeline across it. Olivo's testimony was that the new easement, the subject of the present litigation, would increase the pressure in the pipeline and that it might cause some danger.

The first jury award was for Darks, tract 1, $12,000; Darks, tract 2, $32,000; Olivo, tract 6, $48,000. As we have said, these verdicts were vacated and a new trial was granted to Transok. The court held that the verdicts were excessive when considered in the light of the fact that a

full range of uses remained to the owners. The motion for new trial of Darks with respect to certain damage issues was denied.

The second jury verdict which was rendered May 21, 1976, made the following awards: Darks, tract 1, $1,000; Darks, tract 2, $2,000; Olivo, tract 6, $5,600.

The appeal of Darks and Olivo seeks review of the court's action in vacating the first verdict and seeks to set aside the second verdict. However, the main thrust of the appeal is that the trial court erred in granting Transok's motion for new trial following the first awards, and that the court erred in certain of its rulings on evidence and discovery in both trials.

Wesley seeks review of the order denying the motion to set aside the judgment which was entered as a result of her acceptance of the check. She claims that she did not understand it and that the court lacked jurisdiction as to her and the other Indian defendants.

Specifically, Olivo seeks reversal on the following grounds:

1. That there is no federal jurisdiction as to him.

2. That the Oklahoma substantive and procedural law applied by the trial court as to the taking of property by eminent domain violated the Constitution of the United States.

3. That the trial court erred in granting a new trial on account of excessiveness of damages and overruling Darks' motion for a new trial.

4. That there was error on the part of the trial court in refusing to permit the presentation of evidence on damages including the value before and after the taking of Olivo's portion of the gas storage formation, and (b) value before and after taking of Olivo's wells and casing to the subsurface formation.

The specific contentions of the defendant-appellant Darks are the same as those raised by Olivo and, in addition, he argues other points such as lack of necessity for the taking under Oklahoma law. He also makes detailed arguments with respect to the trial court's refusal to allow at the second trial evidence as to severance damage and trespass damages to Darks' land prior to the date of taking.

I.

We first consider the argument that the district court did not have jurisdiction over the Indian defendants because the Secretary of the Interior was not served and was an indispensable party. For this proposition some language contained in United States v. Oklahoma Gas & Elect. Co., 127 F.2d 349, 354-55 (10th Cir. 1942), *aff'd*, 318 U.S. 206 (1943), is relied on. The court in that case did say by way of dicta that the Secretary is an indispensable party. It cited Minnesota v. United States, 305 U.S. 283 (1939), which contains a statement that the United States is an indispensable party to such an action. The Supreme Court did not refer to this issue in affirming the *Oklahoma Gas* decision. In a later case, Town of Okemah v. United States, 140 F.2d 963 (10th Cir. 1944), this court referred to the United States as an indispensable party and did not mention the Secretary as being an indispensable party. In accord is Semple, *Oklahoma Indian Land Titles Annot.* § 802 at 546 (1952). It is to be concluded that that one statement in *Oklahoma Gas* is not authority for the proposition that the Secretary is indispensable.

The appellants also rely on the Act of May 27, 1908, § 6, 35 Stat. § 312, which authorizes representatives of the Secretary to counsel and advise all allottees of restricted lands and to take such steps as are necessary to protect them or assist said allottees in acquiring and retaining possession of their restricted lands. Another statute, that of August 4, 1967, 61 Stat. § 731, authorizes the attorneys provided for by the Act to represent Oklahoma Indians before

state courts of Oklahoma. This provision does not purport to deal with representation of Indians in federal court and does not state that Indians must be represented by these attorneys.

The further statutory provision relied on is § 3(c) of the Act of August 4, 1947, 61 Stat. § 732, which states that no proceeding in which members of the Five Civilized Tribes are parties may be removed to a federal court except upon the recommendation of the Secretary. This, however, falls short of requiring the Secretary to be a party.

We conclude that all necessary parties were served and that the Indian defendants were properly represented. On this issue the trial court found that the government vigorously represented the Indian interests. Appellant Wesley (or Lucas) has not claimed otherwise.

Nor do we agree with counsel for the appellants that the approval of the Secretary was a prerequisite to condemnation. There is one statute, Section 11, Act of August 4, 1947, 61 Stat. § 734, which provides that no order of the Corporation Commission under the "oil and gas conservation laws of Oklahoma," affecting restricted Indian land shall be valid until submitted to and approved by the Secretary of the Interior. In this case it does not appear that the Secretary refused to approve the order nor does it appear that § 11, *supra*, makes approval by the Secretary necessary to this condemnation action.

Certification by the Corporation Commission under the "oil and gas conservation laws," 52 O.S. §§ 81-287, is designed to regulate the oil and gas industry. While a certificate is also required for condemnation of underground storage facilities under a different chapter, 52 O.S. § 36.4, formal condemnation proceedings in federal court are necessary before it can have any effect as to Indian land. Similarly, the consent of the Secretary is required in order for a state to acquire the rights of way across allotted lands under 25 U.S.C. §§ 311, 312, 319, 321, 323, but § 357 does not

impose such a requirement. Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959); United States v. Oklahoma Gas & Elect. Co., *supra*. Undoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required.

The other points such as the inadequacy of the Oklahoma Corporation Commission Order under 52 O.S. §§ 36.3 (b) and 36.4(b) are unfounded. Nor is there merit in the contention that § 357 only authorizes condemnation of the interests of original allottees and not the interest of heirs of allottees. *Oklahoma Gas, supra,* 318 U.S. at 207; Town of Okemah v. United States, 140 F.2d 963, 965 (10th Cir. 1944). Nor is the fact that the language in § 1, Act of May 27, 1908, 35 Stat. § 312 refers to the exercise of right of eminent domain over allotted lands, thereby precluding the taking of a subsurface facility. Such a reading of the statute would produce a ridiculous result.

II.

Both Darks and Olivo argue that there can be no jurisdiction because subject matter jurisdiction exists only because of 25 U.S.C. § 357, which allows the condemnation of lands allotted in severalty to Indians. Even if the United States court can exercise jurisdiction over the Indians, Darks maintains as does Olivo that there can be no jurisdiction exercised over them.

The appellants rely on United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). Particularly they rely on the language in United Mine Workers that if the state issues substantially predominate whether in terms of proof, scope, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice to be tried in state courts. The trial court reasoned that § 357, *supra*, authorized the condemnation of any lands in which restricted Indians held an interest.

The trial court said that even if the surface of the land were considered a separate subject matter under § 357, the court had pendent jurisdiction over the condemnation of Darks' and Olivo's lands. It further stated that it would be a waste of time to dismiss the non-Indian defendants after two years of litigation.

It should be noted that the Indian defendants settled before the trial.

We do not rely solely on the trial court's first theory that § 357 confers federal jurisdiction over non-Indians who hold an interest in land in which allotted Indians also hold an interest.

In United Mineworkers v. Gibbs, *supra*, the Supreme Court said that for pendent jurisdiction to exist, the federal claims must have substance sufficient to confer subject matter jurisdiction on the court. The Court laid down the requirement that the state and federal claims must derive from a common nucleus of operative fact, and the additional test that was used was whether the claims are such that the plaintiff would ordinarily be expected to try them all in one judicial proceeding. It added that pendent jurisdiction may be exercised by the court in a particular case when "Its justification lies in considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726.

In *Gibbs* there was no question of different defendants, but subsequent cases from the circuits have extended the *Gibbs* reasoning to pendent jurisdiction over state law claims against defendants over whom there is no independent basis of federal jurisdiction if the claim arose out of the same nucleus of operative fact as the federal claims applicable to another defendant. *See* Curtis v. Everette, 489 F.2d 516 (2d Cir. 1973), *cert. denied,* 416 U.S. 996; Almenares v. Wyman, 453 F.2d 10 (2d Cir. 1971), *cert. denied,* 405 U.S. 944; Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971); F. C. Stiles Contracting Co. v. Home

Insurance Co., 431 F.2d 917 (6th Cir. 1970). *But see* Hymer v. Chai, 407 F.2d 136 (9th Cir. 1969).

In a 1976 case, Aldinger v. Howard, 427 U.S. 1 (1976), the Supreme Court discussed the subject of pendent party jurisdiction in the context of an action alleging violation of civil rights under 42 U.S.C. § 1983. A county employee there sued her supervisor, the commissioners and the county itself, claiming that her discharge violated her constitutional rights. The problem arose because there was no federal jurisdiction over the county under 28 U.S.C. § 1343(3) because the county was not suable as a "person" under § 1983.

The Court disapproved of adding a completely new party over whom the court would have no power under the Civil Rights Act. The Court thought that this was an unwarranted extension of the pendent jurisdiction doctrine. At the same time the Court was careful to limit its decision to jurisdiction under § 1343(3) and § 1983, *supra*. The Court said that other alignments of parties and claims might call for a different result, such as with federal torts claims where the grant of jurisdiction is exclusive against the United States, for only in the federal court could all of the claims be tried together.

Cases decided since the *Aldinger* case have construed it somewhat narrowly. *See* Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977); Long Prairie Packing Co. v. Midwest Emery Freight, 429 F. Supp. 201 (D. Mass. 1977). This attitude is not necessarily justified from a reading of *Aldinger*, which can be read to indicate that there is power to exercise pendent party jurisdiction unless Congress has expressly or impliedly negated such power in a particular jurisdictional context. *See* Comment, 77 Calum. L. Rev. 127 (1977).

The federal claims must, however, be substantial. In our case the claims quite clearly arise out of the same factual nucleus and normally a condemnor would seek to have all interests in the property adjudicated in one action.

Furthermore, our case is similar to the test discussed in *Aldinger*; Under § 357, there is exclusive jurisdiction in federal court to try the federal claim, whereby there can be a trial of all of the claims only in federal court.

We finally consider whether there was an abuse of discretion in exercising pendent jurisdiction in this case by trying the non-Indian cases after the settlement of the Indian ones.

While there was language in *Gibbs* that if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Nevertheless, late cases seem to be contrary to this dictum. *See* Rosado v. Wyman, 397 U.S. 397, 404 (1970), where the Court ruled that mootness as to the federal question did not deprive a federal court of power to hear pendent state claims. The court said: "Mootness, . . . may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court." *Id. See* Hagans v. Lavine, 415 U.S. 528, 545-550 (1974). Therefore, the *Gibbs* dictum is not a restriction on the court's power but rather is a guide to the exercise of its discretion. It would seem that the state claim would not have to be dismissed as long as the federal claim is not dismissed for insubstantiality. Stated differently, unless insubstantiality is the situation, the federal court would have the power to decide the pendent claim. *See* State of Arizona v. Cook Paint & Varnish Co., 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 1327 (1977); Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974); Brunswick v. Regent, 463 F.2d 1205 (5th Cir. 1972); 3A Moore's Federal Practice, ¶ 18.07 [1.—3] & n. 41.

Exercise of power over the state claims has been approved despite dismissal of the federal claims where substantial amounts of time and energy have been spent in the

case. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). In that case a number of motions had been heard and a special master in charge of discovery had been appointed. The motion to dismiss was made on the eve of trial. Retention was upheld. *See also Klaus, supra; Kavit, supra.*

In the case at bar the federal claims are substantial. The complaint had been filed in July 1973, and for over two years the court had heard and decided motions and appointed commissioners to determine just compensation. The federal claims were settled in August 1975, just before trial. Finally, this would be a bad time to dismiss non-Indian claims after four years and two jury trials. It would be a shocking waste of time and money now to require this cause to be relitigated in the state court.

We have concluded that the trial court did not err in granting Transok motion for a new trial because of excessiveness of the verdicts.

The trial court properly instructed the jury as to the proper measure of damages and submitted summaries of the evidence and advised the jury that the verdict as to each tract had to fall within the ranges of just compensation as shown by the summaries submitted. In fact the verdicts turned out to be within the guidelines contained in the summaries. However, the amounts in each instance crowded the outside limit set in the range of figures furnished by the experts. It was because of this that the court ordered a new trial. The judge did so on the basis of this court's decision in Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972), in which the breadth of the trial court's discretion to grant or deny a new trial was emphasized. *See also* Harris v. Quinones, 507 F.2d 533 (10th Cir. 1977).

Appellants would have us now hold that the trial court was in error in not offering as an alternative to the motion for new trial a proposal for a remittitur. They say that this was required. We disagree. If a remittitur is offered, the

alternative which is, so to speak, threatened is the granting of a new trial. It does not follow from this that every time a new trial is ordered it also must be accompanied by a proposal for remittitur.

A distinction is to be drawn between appellate review of a grant of a new trial and review of denial of a motion for new trial. In the latter, the appellate court may be less likely to reverse than in the former situation. Yet the standard is still abuse of discretion. *See* Taylor v. Washington Terminal Co., 409 F.2d 145 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 835, where the court said that they would reverse the granting of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within the maximum limit of reasonable range.

To the same effect are Gleason v. Hall, 555 F.2d 514 (5th Cir. 1977); Ehret Co. v. Eaton, Yale & Towne, Inc., 523 F.2d 280 (7th Cir. 1975); 6A Moore's Federal Practice ¶ 59.05[5].

In the present case the appellants' witnesses testified to a total loss of value as a result of the taking of the easement, and Transok's witnesses indicated no substantial taking and need for compensation at all. The judge in granting the new trial said that both positions were wrong. Considering the very limited taking and considering the fact that the awards approach the high marks, we are unable to see that the trial court abused its discretion in granting the motion for new trial.

IV.

Finally, we consider whether the trial court erred in its ruling on the reception of evidence and its instructions.

The underground area sought to be condemned was 2,500 feet beneath the surface that underlay about 3,640 acres in Hughes County, which property was owned by about 25 owners, according to appellants' estimate. Only a

part of this formation was considered in this condemnation action. There are related actions in the state court. We see no shortcoming in the trial court's instructions. It fairly defined the standards to be followed in making the award.

As to the evidence:

Appellants offered evidence of the value of the entire formation of the gas storage reservoir. This was apparently on the theory that compensation should amount to a percentage of the total value of the reservoir equal to defendants' percentage of the surface area over the reservoir. Such a formula would constitute a measure based upon the value to Transok rather than the value of the property taken. That the latter is the law in Oklahoma is shown by McInturff v. Oklahoma Natural Gas Transmission Co., 475 P.2d 160 (Okla. 1970); Cases from other states are to the same effect. Home Gas Co. v. Miles,. 358 N.Y.S.2d. 846 (Sup. Ct. 1974); Midwestern Gas Transmission Co. v. Mason, 201 N.E.2d 379 (Ill. 1964).

Olson v. United States, 292 U.S. 246 (1934), is not relevant because here in contrast to *Olson* there is no possibility of the 25 owners combining to operate a storage facility so as to come within *Olson*. *See* 292 U.S. at 257.

Severance damages were sought based upon diminution in value of the entire ranch. The trial court instructed the jury to disregard this evidence. The court's exclusion of this was justified on the basis that the testimony as to reduction of the value of the entire ranch as a result of this easement was, to say the least, insubstantial. Nor did the trial court abuse its discretion in denying Darks permission to introduce evidence of alleged pretaking trespass.

The judgment of the district court is affirmed.

NOVEMBER TERM—December 12, 1977

Before The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge,
The Honorable William E. Doyle, Circuit Judge

TRANSOK PIPE LINE COMPANY,	)	
	)	
Plaintiff-Appellee,	)	No. 76-1647
	)	
vs.	)	No. 76-1648
	)	
MAXWELL DARKS, et al,	)	No. 76-1972
	)	
Defendants-Appellants.	)	

This matter comes on for consideration of appellants' petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

s/ Linda A. Carlson
Deputy Clerk

APPENDIX "C"

(Orders from companion cases)

FILED
MARCH 5, 1973

BEFORE THE CORPORATION COMMISSION OF
THE STATE OF OKLAHOMA

APPLICATION OF TRANSOK PIPE LINE COMPANY PURSUANT TO 52 O.S. 36.1 et seq. FOR A CERTIFICATE DECLARING THAT THE CHANNEL BOOCH FORMATION UNDERLYING NE/4 NE/4 SECTION 2, N/2 N/2 SECTION 1, TOWNSHIP 7N, RANGE 10E; E/2 SE/4 AND SE/4 NE/4 SECTION 35, S/2 AND NE/4 AND S/2 S/2 NW/4 SECTION 36, TOWNSHIP 8/N, RANGE 10E; SW/4 AND N/2 N/2 SE/4 AND N/2 SECTION 31; S/2 SW/4 AND SE/4 SECTION 30; N/2 NW/4 AND N/2 S/2 NW/4 AND N/2 N/2 NE/4 SECTION 32; S/2 AND NE/4 AND S/2 NW/4 AND NE/4 NW/4 SECTION 29; N/2 AND NW/4 SE/4 AND N/2 SW/4 AND N/2 S/2 SW/4 SECTION 28; S/2 SW/4 SE/4 AND SE/4 SE/4 SECTION 20; S/2 AND NE/4 AND SE/4 NW/4 SECTION 21; W/2 W/2 SECTION 22; W/2 NW/4 SECTION 27, TOWNSHIP 8N, RANGE 11E, HUGHES COUNTY, OKLAHOMA ARE SUITABLE FOR UNDERGROUND STORAGE OF NATURAL GAS AND THAT ITS USE FOR SUCH PURPOSES IS IN THE PUBLIC INTEREST.	CAUSE CD NO. 35868 ORDER NO. 96291

REPORT OF THE COMMISSION

ORDER CORRECTING ORDER NO. 95952

This cause came on for hearing before R. F. Thweatt, Trial Examiner for the Corporation Commission of Oklahoma, on the 16th day of January, 1972, in the Commission's courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission, for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Mr. Roger R. Scott, Attorney, and Mr. Charles B. Crane, Attorney, appeared for the applicant, *Transok Pipe Line Company*; Mr. William C. Majors appeared for Diamond L., Inc., and Mrs. James Logan; Mr. Maxwell Darks, Attorney, Hubert Douglas, Jr., Miller D. Jones, Ernest Allen, Ms. Elizabeth Star, Bert Wininger, Beaden Hope, and Ms. Frances Wood appeared for themselves. Mr. Harvey Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner heard the cause and filed his report recommending that the application be granted; time was allowed within which exceptions might be filed to said report, and none having been filed, the Commission being in executive session and being fully advised in the premises, therefore finds as follows:

FINDINGS

1. That this is an application of Transok Pipe Line Company for a certificate declaring that the Channel Booch Formation underlying NE/4 NE/4 Section 2, N/2 N/2 Section 1, Townhsip 7N, Range 10E, E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E; Hughes County, Oklahoma, are suitable for underground storage of natural gas and that its use for such purpose is in the public interest.

2. That the Commission has jurisdiction over the subject matter herein and no protests have been entered to the granting of the application.

3. That the applicant, Transok Pipe Line Company, is an Oklahoma corporation engaged in the business of transporting and transmitting natural gas by pipeline within the State of Oklahoma for ultimate public use, and qualifies as a natural gas public utility as defined in 52 Okla. Statutes 36.1.

4. That the Channel Booch Sand underlying the NE/4 NE/4 Section 2, N/2 N/2 Section 1, T7N, R10E; E/2 SE/4 and SE/4 NE/4 Section 35, S/2 and NE/4 and S/2 S/2 NW/4 Section 36, T8N, R10E, SW/4 and N/2 N/2 SE/4 and N/2 Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, T8N, R11E, Hughes County, Oklahoma, is a dry gas reservoir, and the volumes of native gas originally in place therein are substantially depleted.

5. That the reservoir which is sought to be used for the underground storage of natural gas is ideally suited for such purpose and has a greater value or utility as a gas storage reservoir for the purpose of insuring an adequate supply of natural gas for applicant's consumers and for the conservation of natural gas, than for the production of the relatively small volumes of native gas which remain

therein, and that such storage of gas is necessary to permit the orderly withdrawal of natural gas at periods of peak demand so as to make more readily available the natural gas reserves of the State of Oklahoma to the consumers of this State; will provide a better year-round market to the various gas fields within the area; will promote the public interest and welfare of the State of Oklahoma; will prevent waste and protect the correlative rights of mineral owners, and is in the public interest.

6. That the Channel Booch Sand underlying the properties described in the application may be reasonably expected to be penetrated by gas displaced or injected into the proposed gas storage reservoir.

7. That no gas from said Booch Sand formation is being used for the secondary recovery of oil.

8. That said Booch Sand formation is not being used by others for the injection, storage, and withdrawal of natural gas in the area of the lands above described; that 2 BCF of native natural gas remains in the reservoir.

9. That the Channel Booch formation aforementioned in this application is identified by the log on the Adelman No. 1-B Well, located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base at approximately 2556 feet.

10. That due to inadvertence and oversight when Order No. 95952 was prepared, the Channel Booch Sand, though named, was not identified as to depth or as to a previously drilled well log in the reservoir area, and this Correction Order is being issued to correctly reflect the testimony at the time of the hearing.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma as follows:

1. That the application of Transok Pipe Line Company for a certificate declaring the Channel Booch Formation underlying the

> NE/4 NE/4 Section 2; N/2 N/2 Section 1, Township 7N, Range 10E; E/2 SE/4 and SE/4 NE/4 Section 35; S/2 and NE/4 and S/2 S/2 NW/4 Section 36, Township 8N, Range 10E; SW/4 and N/2 N/2 SE/4 and N/2 of Section 31; S/2 SW/4 and SE/4 Section 30; N/2 NW/4 and N/2 S/2 NW/4 and N/2 N/2 NE/4 Section 32; S/2 and NE/4 and S/2 NW/4 and NE/4 NW/4 Section 29; N/2 and NW/4 SE/4 and N/2 SW/4 and N/2 S/2 SW/4 Section 28; S/2 SW/4 SE/4 and SE/4 SE/4 Section 20; S/2 and NE/4 and SE/4 NW/4 Section 21; W/2 W/2 Section 22; W/2 NW/4 Section 27, Township 8N, Range 11E, Hughes County, Oklahoma,

are suitable for underground storage of natural gas, and that its use for such purposes is in the public interest, and that said application be, and the same is by this order granted.

2. That said Channel Booch formation is identified by the log on the Adelman No. 1-B well located in the center of the NW/4 NW/4 of Section 28, Township 8 North, Range 11 East, Hughes County, Oklahoma, showing a top of approximately 2496 feet and a base of approximately 2556 feet, and that such stratum or formation is suitable for the underground storage of natural gas. That the evidence in this cause shows that there are approximately 2 BCF of native gas remaining in this reservoir.

3. That Transok Pipe Line Company is authorized and empowered to use and operate the Channel Booch Sand underlying the described lands for the purpose of underground storage of natural gas, all in accordance with and subject to the limitations of 52 Okla. Statutes 36.1 et seq.

4. That applicant, Transok Pipe Line Company, will be the owner of all natural gas injected into the said Booch Sand Formation underlying the above-described lands, and no person other than said applicant shall have the right to produce, take, reduce to possession, waste, or otherwise interfere with, or exercise any control over such gas: provided, however that the owner of said lands, or of other rights or interests therein shall have the right to drill through said formation in such manner as shall protect said formation against pollution and the escape of natural gas therefrom, and in accordance with such orders, rules and regulations as the Commission may make for the protection of such underground storage.

5. That this Order should be and is hereby declared to be the Certificate required by 52 O.S. 1961, Sec. 36.4, as a condition precedent to the filing of the application or petition for condemnation of Transok Pipe Line Company in the courts of the State of Oklahoma.

DONE AND PERFORMED this 5th day of March, 1973.

CORPORATION COMMISSION OF OKLAHOMA

s/ Charles Nesbitt
Charles Nesbitt, Chairman

Ray C. Jones, Vice Chairman

s/ Rex Privett
Rex Privett, Commissioner

ATTEST:

s/ Ed Overholser
Ed Overholser, Secretary

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

WASHINGTON, D.C. 20242

Mr. Maxwell Darks
1601 Southwest 77 Terrace
Oklahoma City, Oklahoma 73559

Dear Mr. Darks:

Your telegram of June 18 advises that you are interested in bidding on the gas storage rights under certain Indian lands in Hughes County, Oklahoma. You further advise that Transok Pipeline Company is also interested in obtaining these same storage rights and that it is now engaged in negotiations with officials of the Department of the Interior in an effort to secure said rights. The opinion is offered that Title 25, Code of Federal Regulations (Indian), requires condemnation action before fee ownership in Indian lands may be conveyed. Your telegram also states that you desire to enter into competitive bidding for the right to purchase the storage rights beneath these Indian lands.

Our Area Oil and Gas office, Tulsa, Oklahoma, has advised us that since early 1971, Transok has been negotiating with the Bureau of Indian Affairs, Area office, Branch of Realty, Muskogee, Oklahoma, regarding a gas storage agreement in Hughes County, Oklahoma. It is our understanding that the Oklahoma Corporation Commission, on January 17, designated the area as being logical for the use of gas storage project and that Transok and the Bureau of Indian Affairs are still in the negotiation stages. The latest meeting between the Bureau of Indian Affairs and Transok was scheduled for July 14.

Therefore it is suggested that you contact the aforementioned Bureau of Indian Affairs office concerning your in-

terest in the gas storage area and your desire to enter into competitive bidding for the gas storage rights.

Sincerely yours,

s/ Henry W. Creller
Acting Director

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MUSKOGEE AREA OFFICE
MUSKOGEE, OKLAHOMA 74401

In Reply Refer to:
Real Property Management
Acq. & Disp.

Jan. 21, 1976

Mr. Maxwell Darks
313 Southwest 103 St.
Oklahoma City, OK 73139

Dear Mr. Darks:

In Cause No. CD 35868, the Corporation Commission of the State of Oklahoma issued its order No. 96291 dated March 5, 1973, finding among other things that the Channel Booch formation underlying certain lands in Hughes County, Oklahoma, is ideally suitable for underground storage of natural gas. This order was not approved by the Secretary of the Interior or his duly authorized representative.

Sincerely yours,

s Allan R. Tedwall
Deputy Area Director